JD–43–10
Cedar Lake, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GRAHAM'S TRUCKING AND
EXCAVATING, INC.

and

Cases 13−CA−45536
13−CA−45590

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 150, AFL–CIO

Elizabeth Salgado Cortez, Esq., for the General Counsel.
Arthur C. Johnson, II, Esq., of Chicago, Illinois,
for the Respondent.
Elizabeth A. LaRose, Esq., of Countryside, Illinois,
for the Charging Party/Union.

DECISION

Statement of the Case

MARK D. RUBIN, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 26 and 27, 2010, based on a charge filed by International Union of Operating Engineers, Local 150, AFL–CIO (Union or Charging Party) against Graham's Trucking and Excavating, Inc. (the Respondent) on September 23, 2009, in Case 13–CA–45536, and a charge filed on October 21, 2009, and an amended charge filed on November 18, 2009, in Case 13–CA–45590 by the Union against the Respondent.

The Regional Director's consolidated complaint dated December 17, 2009, alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activity and testimony at an NLRB hearing, advising employees that they should not testify against the Respondent at said hearing, and telling employees that it was futile to support the Union, and violated Section 8(a)(3) of the Act by refusing to pay employee Garland Lee Bradley on September 18 for hours previously worked. The complaint further alleges that by engaging in said actions, the Respondent caused Garland Lee Bradley (Bradley) to resign his employment with the Respondent and, hence, violated Sections 8(a)(3) and (4) of the Act by constructively discharging him in retaliation for his activities in support of the Union and because he testified at an NLRB hearing. The Respondent defends by denying the occurrence of the alleged 8(a)(1) activity and denying that it refused to pay Bradley.

At the trial, the parties were afforded a full opportunity to examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file briefs.

Based on the entire record, including my observation of witness demeanor, and after carefully considering the briefs[1] of all parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, an Indiana corporation, maintains an office and place of business in Cedar Lake, Indiana, where it has been engaged in the business of construction and excavating. During the calendar year 2009, in conducting its business operations as described, the Respondent purchased and received at its Indiana facilities goods valued in excess of $50,000 directly from points outside the State of Indiana. I find, and the Respondent admits, that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(5) of the Act.

II. Labor Organization

I find, and the parties stipulated, that the Union has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

Background

The Respondent is engaged in the construction excavation contracting business from its two locations, in Hebron and Cedar Lake, Indiana. George Snure (Snure) owns the Respondent, which he purchased in 2007, and Snure's wife, Patricia[2] Snure, is employed as the Respondent's head bookkeeper. The Respondent, typically, employs between 12 and 15 employees and independent contractors, and pays its workers biweekly on Fridays, at the end of the workday.[3]

The complaint allegations arose amidst the Union's campaign to organize the Respondent's employees, which began about April 2009.[4] The Respondent opposed the attempt to organize its employees.[5] The Union filed its representation petition with the Board on July 1, 2009, and the election was conducted at the Cedar Lake location on August 7, 2009, with determinative challenges resulting. A hearing was held on the challenges on September 4, 8, 9, and 10, 2009, before a Region 13 hearing officer, who issued his report on challenges on October 20, 2009.

At the hearing, the Respondent contended that the challenges to the ballots of Bradley, David Alvarado, Simon Hermann, and Jesse Jalbert should be sustained as they, assertedly, were independent contractors rather than employees, while the Union contended to the

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[1] Neither counsel for the General Counsel nor counsel for the Respondent filed a traditional posthearing brief which separates fact from argument. Instead, both briefs simply weaved argument and favorable facts together.

[2] The Respondent's counsel called her to the witness stand as "Trisha." But documents in the record contain her signature as "Patricia."

[3] Credited testimony of Patricia Snure.

[4] Credited testimony of Bradley.

[5] Credited testimony of Patricia Snure.

contrary. Alleged discriminatee Garland Lee Bradley[6] testified at the hearing on September 4, pursuant to a subpoena requested by the Union. Bradley testified in support of the Union's argument that he was an employee rather than an independent contractor, while the Respondent's owner, George Snure, also a witness, testified to the contrary. Snure was present during Bradley's testimony.[7] The hearing officer, in his October 20 report, found these challenged individuals, including Bradley, to be employees of the Respondent and overruled the challenges to their ballots. No exceptions were filed to the hearing officer's report.[8]

August 7-10

As noted, the NLRB election took place on Friday, August 7, at the Cedar Lake location. Patricia Snure acted as the Respondent's observer during the election, Bradley cast a ballot during the election, and Patricia Snure, as an observer, was aware that he had voted.[9] The election took place on a payday, and Snure or Patricia Snure distributed checks to employees, but not to Bradley. Snure told Bradley that he brought other employees' paychecks but didn't bring Bradley's paycheck to the election site[10] because he didn't expect Bradley to be at the election.[11]

Bradley did receive his paycheck from Snure the following Monday, August 10. According to Bradley, while he was at work on Monday, Snure asked Bradley questions, including why Bradley voted or had the right to vote at the NLRB election. Bradley responded that he had originally applied for work as a full-time employee, that he was a full-time employee, and so he voted.

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[6] Bradley, a heavy equipment mechanic, began working for the Respondent in February, 2009. On April 17, 2009, the Respondent required Bradley to sign a document entitled "Sub-Contractor Agreement." The document contains the following: "Starting February 23, 2009, Mr. Bradley is being hired as a sub-contractor by GTE. As a sub-contractor, Mr. Bradley understands that he is not an employee and will not receive any employee benefits."

[7] Credited testimony of Bradley.

[8] At the inception of the hearing I granted counsel for the General Counsels' unopposed "Motion in Liminie to Exclude Relitigation of Previously Litigated Evidence in a Representation Proceeding Regarding Garland Lee Bradley's Section 2(3) Employee Status." In response to the General Counsel's motion, the Respondent's counsel stated that the Respondent accepted the Board's ruling in the representation case that Bradley is an employee rather than an independent contractor, and does not seek to relitigate the issue. The Respondent's counsel further stated that while he had no intention of introducing evidence to contest Bradley's employee status, he would, and he did, introduce evidence to demonstrate that whatever Bradley's status may actually have been, the Respondent had viewed him, correctly or incorrectly, as an independent contractor. Neither the counsel for the General Counsel, nor counsel for the Union, objected to the Respondent's introduction of such evidence.

[9] Patricia Snure so testified.

[10] Bradley ordinarily worked at the Hebron location. The election took place at Cedar Lake.

[11] Credited testimony of Bradley. While Snure did not directly deny Bradley's testimony, he speculated that the reason Bradley did not receive his check on August 7, as opposed to the other employees who did receive their checks, was that Bradley left work before the election was completed. "I'm 99.9% sure that the reason he didn't get his check was because he left before the election was finalized in total."

Snure also questioned Bradley utilizing a questionnaire he had prepared prior to the meeting. Snure asked Bradley whether he wanted to work for the Respondent. Bradley answered, "Yes." Snure asked Bradley if he was happy "with the arrangement at Graham's Trucking and Excavating?" Bradley answered "Yes." Snure asked Bradley "if he understood that he was currently viewed by Graham's as an independent contractor?" Bradley answered, "No." Snure asked if Bradley "felt that Graham's Trucking had changed his status from independent contractor to employee?" Bradley answered, "No."[12]

At some point during the meeting, Snure then offered Bradley his paycheck, but only if he agreed to sign a document entitled "Waiver of Lien." The waiver, by its language, in exchange for the payment of monies to Bradley, waived and released, "any and all claims, demands, causes of action, and rights of lien," against certain named properties, and against all of the Respondent's customers.

Snure told Bradley he wanted him to start signing waivers before receiving his paychecks. Bradley initially refused to sign the waiver, but decided to call "the Union attorney."[13] After consulting with the attorney, Bradley signed the waiver, and received his paycheck from Snure.[14]

Prior to August 10, 2009, the Respondent had not required Bradley, nor anyone else, to sign the waivers. On August 10, the Respondent decided to require signed waivers from workers it considered to be independent contractors because the independent contractor issue had been raised during the August 7 NLRB election.[15] There are no complaint allegations as to

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[12] Parties stipulated that Snure asked questions from a written questionnaire, an exhibit in the record. Bradley's answers based on Bradley's credited testimony.

[13] Bradley's testimony.

[14] Snure testified that he returned from vacation on August 10 in order to give Bradley his paycheck, but rather than simply presenting Bradley with the paycheck, told Bradley that he was not allowed to drive a company vehicle, and then got into a back and forth argument as to Bradley using one of the Respondent's vehicles. According to Snure, he then "sat him down," and discussed Bradley's use of a company vehicle. At some point during this discussion, according to Snure, Bradley spontaneously raised the topic of the Union as follows: "Right off the bat his first claim was the Union threatened me with my job. Lee said that the Union would not let him have his job if he didn't sign something. He tried to tell me about a meeting that occurred and he was notified the day before, the hour before. He said I didn't want to go to the meeting, I'm trying to keep you informed. I told Lee I don't want to talk about that." Snure, acknowledged during his testimony, that he presented Bradley with his paycheck, after Bradley signed the release. As to the balance of his testimony as to the August 10 conversation with Bradley, it's not clear whether, in fact, Snure meant to testify that the verbal exchange occurred during the August 10 conversation or during a later conversation in September, or during both. Indeed, after Snure apparently testified on direct examination as to the August 10 conversation with Bradley, he asked the Respondent's counsel, "Were we talking about 8/10 or September 18?" Respondent's counsel replied, "I believe my questions were on September 18."

[15] Here, I've credited the testimony of Patricia Snure to the effect that August 10 was the first time the Respondent required a signed waiver, and the reason the Respondent required the waiver was because the issue of which individuals were independent contractors and which were employees had been raised during the course of the NLRB election. While Snure is the wife of the Respondent's owner, and thus has her own vested interest in the outcome of the litigation, she, nevertheless, displayed impressive testimonial demeanor. She listened carefully to the questions, and while obviously stressed by the circumstances of having to testify, she

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Bradley not receiving a paycheck on August 7, as to the Respondent's mandating that Bradley sign a release to receive his paycheck, or as to Snure's questioning of Bradley on this date.

Bradley did not receive his paycheck on the following payday, Friday, August 21.[16] Bradley credibly testified that he received his paycheck the following Monday, August 24, and that "I had to sign a waiver to get my check." Again, neither the waiver requirement nor the delayed pay date are alleged as violations in the complaint.

Bradley testified at the NLRB hearing on challenges on Friday, September 4, 2009, a payday for the Respondent's employees. Bradley did not receive his paycheck that day.[17]

September 8

Bradley initially testified that on September 8, at the Hebron workplace, he approached Snure about his paycheck which he had not received the previous Friday. When asked by counsel for the General Counsel what was said and by whom, Bradley testified: "It was said by George Snure, and it was just me and him there in the office lounge, whatever you want to call it, it all went back to he just couldn't believe that I was there testifying for the Union against him, why, you know, again, he thought I was a, I thought I was a full-time employee. It was all in relations to me testifying on that previous Friday, that he didn't think I should have been there, he wanted to know why I thought I had a right to be there."[18]

As I was dissatisfied with the quality of the above testimony and concerned with whether it was even understandable, I asked counsel for the General Counsel to revisit the conversation, and counsel for the General Counsel again asked Bradley to testify as to the conversation as follows: "Take your time, step by step, exactly what was said in that conversation?" In response to the counsel for the General Counsel's question, Bradley testified, "I walked in and I wanted my check." As, in my judgment, Bradley still didn't seem to comprehend the question he was being asked, I intervened and attempted to explicitly direct Bradley to testify as to who said

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generally gave complete, nonargumentative answers to the questions of all counsel.

Contrariwise, I do not credit George Snure, Patricia's husband, as to his explanation as to why the Respondent began requiring Bradley to execute waivers before being paid. Snure testified that the Respondent imposed the requirement because "I have a business attorney and a tax attorney that had told me to try and create a final line for IRS purposes for what an IC [independent contractor] and an employee are." But later, Snure testified that his business attorney first raised the issue in May. Inasmuch as the Respondent first required a waiver on August 10, just 3 calendar days after the NLRB election, but over 2 months after the Respondent's business attorney assertedly gave his advice, the timing is demonstrative that the version testified to by Patricia Snure is credible, as opposed to that of George Snure. George Snure's testimony here displays a lack of candor.

[16] The details of Bradley not receiving his paycheck on August 21 are not delineated in the record.

[17] On direct examination Bradley testified as follows as to his paycheck due September 4, 2009: "That evening when we got done I had called looking for my check. I was told that I…didn't have it and I didn't get paid until, I believe, the following Monday or Tuesday of that next week." On cross-examination, Bradley testified that his girlfriend told him that she had tried to pick up his check from the Respondent, but was told that Bradley had to sign a waiver before his check would be released. While there was no objection to this latter testimony, I find it to be unreliable because of its hearsay nature.

[18] Testimony verbatim from the transcript.

what during the conversation, as follows: "What I want you to tell me is what happened when you went in, what you said, what he said." Eventually, Bradley testified, "He said why do you have the right to vote. He said he didn't understand why I was there. He said he… I'm sorry that's about it, to my recollection."

Then, after so testifying on direct examination as to the asserted September 8 conversation with Snure, Bradley was further examined on cross-examination by the Respondent's counsel as to said meeting, as follows: "Q. Now, you said that you had a meeting with George [Snure] on September 8? A. I don't recall." "Q. Did you have a meeting with George [Snure] on September 8? A. I was looking. Q. What are you looking at? A. The witness affidavit." Bradley was then directed by the undersigned not to refer to his affidavit, and the Respondent's counsel continued his cross-examination as follows: "Q. Okay, so you don't know if you had a meeting with George [Snure] on September 8? A. I don't recall." Snure testified that the only date in September that he remembered having a conversation with Bradley was September 18.

Inasmuch as Bradley testified to different versions of what Snure assertedly told him on September 8, and then testified that he didn't remember whether, in fact, he even met with Snure on September 8, and in view of Snure's implicit denial that he spoke with Bradley on September 8, I cannot credit Bradley's testimony as to what may have been said during the conversation, if there even was one. On the other hand, Bradley did testify that Snure presented him with his paycheck that day, upon Bradley complying with Snure's request to sign a lien waiver, and I find that such occurred.

September 18

All parties agree that the conversations between Snure and Bradley which occurred on September 18 and on October 10, 2009, are central to a determination as to whether the Respondent committed the alleged unfair labor practices. A summary of the testimony of the witnesses, and my findings as to these conversations, follow.

On Friday, September 18, 2009, a payday for the Respondent's employees, at about 10 a.m., while Bradley was working on a vehicle transmission at the Respondent's Hebron shop, Snure asked Bradley[19] to report to the employee lounge. Once in the lounge, Snure told Bradley that John Sigstad[20] was there (in the lounge) as a witness. According to Snure, he began the meeting by telling Bradley that "the meeting was basically for two reasons, to clarify the company's position with independent contractors and then as we go along to clear up misunderstandings."[21]

Snure testified that Bradley responded, "I didn't want to be subpoenaed, I fought the subpoena."[22] According to Snure, he told Bradley that he didn't want to talk about those issues,

[19] Or, according to Sigstad, Sigstad asked Bradley, on behalf of Snure.

[20] Sigstad, called as a witness by the Respondent, is Snure's cousin, and a salaried mechanic employed by the Respondent.

[21] Snure testified that he called the meeting with Bradley "to try and resolve and clarify issues that had been brewing for months, complaints, trying to clear up misunderstandings that had arisen because he wasn't able to talk to me all the time."

[22] Upon Snure so testifying, I asked "And so, you never mentioned a word about subpoena and all of a sudden for no reason you know of he started talking about subpoenas?" Snure answered, "Correct." The "subpoena" reference was obviously as to the Board's hearing on

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but Bradley continued and said that he was threatened that if he didn't go and testify, he wouldn't be an employee, he wouldn't get his job, that he was promised "a card," that it was all about "a card," and that the union had promised him a job if he was fired. Snure testified that he responded to Bradley that he had to be careful what they talked about.

Snure also testified that during the meeting he asked Bradley various questions from a questionnaire he had prepared prior to the meeting, the questions mainly pertaining to Bradley's status as an independent contractor in the Respondent's view, and that during the course of the questioning he explicitly told Bradley that "you are now required to file a waiver of lien for every check issued by Graham's Trucking and Excavating."[23] Snure testified that Bradley responded, ""You're forcing me to do this," and that Snure replied, "I'm not forcing you to do anything. You don't have to sign anything." According to Snure, Bradley said, "You're threatening me, you're withholding my pay." Snure testified that he replied to Bradley that he was not withholding his pay, that Bradley responded, "This is a game. Just give me my check now and I'll leave." Snure testified that he replied that he didn't have Bradley's check.[24]

According to Snure, also during the meeting he instructed Bradley that in order for Bradley to be paid for making a "parts run," the Respondent's parts run document needed to be signed, that Bradley's use of the Respondent's computer at work did not comport with the Respondent's rules,[25] that as an independent contractor Bradley was not allowed to drive a company vehicle because he was not on the Respondent's insurance, that independent contractors were allowed to set their own hours, and that Bradley should gather up his tools because Snure didn't want Bradley to use the Respondent's tools. At some point, according to Snure, Bradley again asked for his check, and told Snure that it was just a game to him [Snure], and that Snure didn't want Bradley working for the Respondent.

Snure testified that after more discussion, and a dispute involving the amount of time Bradley took to perform a "parts run," Bradley again told Snure that, it was all a game to him, and said that, "You're not going to give me my check, I'm leaving. According to Snure, he replied, "Lee, I don't have your check," and Bradley responded, "Fine, I'll get it later," and walked out the door with Snure following.

Snure's testimony, verbatim, is as follows as to the conversation and interaction after he and Bradley walked outside: "Lee, please stay, I need the transmission fixed. I'm out of here, this is a game, George. Lee, if you stay until the end of the day, I'll have your check. Keep your check. Lee, you just got done telling me you need money. This is just a game to you, George. He then starts his car. Lee, I'll give you $500 if you stay and fix this transmission. This is just a game to you George." Snure testified that Bradley then drove away.

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challenges.

[23] Yet, Snure was asked on cross-examination, "In order for him [Bradley] to receive his pay he had to sign this waiver now, didn't he?" Snure answered, "Not that I'm aware of. He got his checks."

[24] Snure testified that the meeting took place at about 10:40 a.m. and that the checks probably hadn't even been printed at that time.

[25] On cross-examination, Snure testified that he knew that Bradley "was on Ebay and match.com," and that he began monitoring Bradley's use of the internet at work "when it became apparent that the garage computer was being abused." There is no complaint allegation involving this.

Bradley denied that the subjects of the Union obtaining a job for him or obtaining a union card came up during his meeting with Snure. Instead, according to Bradley, Snure told him that he couldn't believe that Bradley had testified [at the hearing on challenges], that "he didn't think I should have been there [at the NLRB hearing]," and that Bradley didn't have the right to testify. Bradley testified that he responded that he testified at the NLRB hearing because he was a "full-time employee." Bradley further testified that Snure said that he still didn't understand why Bradley voted and why Bradley thought he was a full-time employee, and that Bradley responded that he had filled out an application for a full-time position with the Respondent and that he had been hired to a full-time position.[26] Finally, on cross-examination, the Respondent's counsel asked Bradley specifically what Snure asked him during the meeting about his union activities. Bradley answered, "Specifically it was is (sic) how I could vote for the Union, what was the audacity of me voting for the union. I mean, exact words, those, that's pretty much exact. There was (sic) others that I can't remember, but that's the exact."[27]

Sigstad testified that he was present for the entire conversation between Bradley and Snure, and that the meeting started out calmly, and then became less so. According to Sigstad, Snure began by telling Bradley, "Lee, I guess we need to have another meeting again concerning how Graham's views Lee Bradley," and then began to read prepared questions to Bradley. Sigstad testified that Snure asked Bradley, "Why do you want to work for Graham's

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[26] Based on his testimonial demeanor, I found Bradley to be a generally honest witness. However, I also note that it was necessary for the counsel for the General Counsel, and for the undersigned, to repeatedly ask certain questions in order to obtain relatively complete answers from Bradley. In this respect, Bradley tended to testify in a stream of consciousness rather than giving specific answers to questions that simply sought the details of conversations, i.e., who said what. From my close observation of Bradley on the witness stand, his style of testimony did not reflect an attempt to deceive, but a failure to understand instructions as to what is required of witnesses testifying in court proceedings.

[27] As noted, this question was asked of Bradley only on cross-examination. Bradley's answer was immediate, spontaneous, direct, and specific. For reasons discussed elsewhere herein, portions of Bradley's testimony are not credible either because they are contradicted by his own testimony or because of Bradley's failure to testify pursuant to instructions from the bench, but not necessarily because Bradley was dishonest in his answers. Here, however, for the reasons set forth above, Bradley's testimony is entirely credible.

Contrariwise, Snure's testimony as to much of what was said during this meeting is less credible. For example, Snure testified that upon the inception of the meeting, Bradley immediately, and without prompting, began talking about the Union and being subpoenaed by the Union. Such was denied by Bradley, and doesn't make sense in the context of a union supporter spontaneously bringing up the subject of the Union to his employer. To the extent that Sigstad's testimony implies that Snure did not ask Bradley about his audaciousness in voting for the Union, I do not credit Sigstad. In this regard I note that Sigstad is a salaried employee of the Respondent, and a relative of Snure.

However, while I generally credit Bradley as to what was said during the conversation, and that Snure told him that absent signing all the paperwork, he could only receive his paycheck from the Respondent's lawyer, I find that Bradley was mistaken in his testimony that Snure had Bradley's paycheck in his hand during the meeting. Snure denied he had Bradley's paycheck, and other credited record evidence demonstrates that the Respondent distributed paychecks near the end of the day, not during the morning, the period when the meeting took place. On this basis, it's not likely Snure had Bradley's paycheck in his hand during the conversation. By this, I do not find that Bradley was not a generally credible witness, but that he was mistaken as to which documents Snure was holding in his hand.

Trucking and Excavating," and that Bradley responded that "he needed a job." According to Sigstad, Snure then asked "Are you happy with the arrangements between Graham's Trucking and Lee Bradley?" Sigstad testified that he believed Bradley answered, "Yes." Sigstad further testified that Snure asked Bradley if he understood that he was currently viewed by Graham's as an independent contractor.[28] Sigstad couldn't remember Bradley's response to this question.

Sigstad also testified that he remembered hearing nothing during the conversation about testimony at the Board hearing. However, on cross-examination Sigstad conceded he might not remember everything said during the conversation and he specifically testified that it's not impossible that the subject of testimony before the NLRB may have been mentioned during the conversation and he simply doesn't remember it. Sigstad further testified, however, that he was certain that the subject of Bradley voting at the NLRB election did not come up. Finally, Sigstad testified that towards the end of the meeting, Snure offered $500 to Bradley if he would stay at work that day and finish work on a transmission. According to Sigstad, Bradley, "continued to walk out, got in his car and drove away." Sigstad was not asked, and did not testify, as to whether Bradley asked for his paycheck or whether Snure refused to give Bradley his paycheck, or told Bradley that if he wanted his paycheck he would either have to sign paperwork or see Snure's lawyer.

Bradley testified that after Snure finished asking him the questions contained on the questionnaire, Snure held up Bradley's check, which had a waiver stapled to it. According to Bradley, Snure told Bradley that if he wanted his check, he was going to have to sign "this paperwork," which included a lien waiver and Snure's notes of Bradley's answers to Snure's questions,[29] and that since Bradley was refusing to sign the paperwork he was not getting his check and would have to get the check from Snure's lawyer. Bradley testified, "Well, he held up, he wanted signatures. George Snure wanted signatures on this paperwork. He lifted up, he had my paycheck with them. He had it stapled to a waiver. He lifted it up and showed it to me and said he wanted the paperwork signed. I did not, I refused to sign the paperwork based on I didn't know what stuff was that I was signing."

Bradley testified that he told Snure, that when Snure was "done playing games," to give him a call. According to Bradley, "At that time I said why should I continue working if I'm not going to get paid, and I walked out." Bradley testified that he then left the lounge, walked to his car, and called his lawyer "to let her know that he was refusing to give me my check."

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[28] Snure, Bradley, and Sigstad testified that during the meeting, Snure asked Bradley a series of questions from a prepared questionnaire. By Snure's admission, some of these questions included asking Bradley why he wanted to work for the Respondent, whether he was happy with his working arrangement with the Respondent, and whether "Bradley was still willing to work for the company as an independent contractor." Bradley and Sigstad both credibly testified that Snure asked Bradley whether he understood that the Respondent viewed him as an independent contractor.

[29] Credited testimony of Bradley. Consistent with my credibility findings, I do not credit Snure's testimony that he didn't ask Bradley to sign the questionnaire notes. In this regard, I note that the questionnaire, in evidence, contains a line explicitly for Lee Bradley's signature, under the heading "Independant (sic) Contractor:" In the space for signature, the following is handprinted: "Do not need him to sign." Sigstad only testified that he didn't remember Snure asking Bradley to sign a waiver.

According to Bradley, as he was headed to his car, Snure stopped him and told him he "would pay me cash to stay and finish the transmission," and Bradley responded "only if you give me my check." Snure replied that Bradley had to get his check from Snure's lawyer, but he would pay Bradley cash to stay and finish the transmission. Bradley again refused and got into his car. Bradley testified that Snure then pulled $700 cash out of his pocket[30] and offered the cash to Bradley if he would stay and finish the transmission. Bradley replied that he would leave if Bradley didn't give him his paycheck. Finally, Bradley testified that Snure told him the only way he would get his paycheck would be from Snure's lawyer and that Bradley, thereupon, drove away. He never worked for the Respondent again, and did not return to the Respondent's premises until October 10, 2009.

With the exception of the detail as to Snure holding Bradley's check, I credit Bradley as to the words exchanged in their conversation, in places where the testimony of Bradley and Snure diverges.[31] In my close observation, neither Bradley nor Snure was without fault as witnesses. Both displayed a propensity to not directly answer some questions, and give nonresponsive answers to other questions, and both at times displayed frustration and confusion with questions asked on cross-examination and by the undersigned. Nevertheless, I found Snure's testimony as to the genesis of his decision to require Bradley to sign waivers to receive paychecks to be noncredible, as discussed supra. Such testimony was not a simple mistake as to what somebody may have observed or heard but was, in my opinion, calculated to mislead the undersigned as to what Snure may have thought to be a significant issue in the case.

On October 1, 2009, the Respondent, sent two letters to Bradley, both signed by Snure. The first contained the following: "Please be advised that your check is and was available. You stormed out of the meeting without any chance of coming to a resolution. All checks are distributed at the end of the day. Unfortunately, it appears you were unwilling to wait. Please be advised you are required, as are similarly situated workers, to fill out any and all paperwork and/or forms when you pick up your check. Please call in advance to allow an office staff member to be at the office to pick it up."

The Respondent's second October 1 letter to Bradley stated as follows: "Please be advised that you are currently storing personal items that are not permitted on Graham's company property. Graham's is unwilling to provide storage or security for and all personal items. You are requested to remove your items during business hours with myself present to avoid any unforeseen issues. Any items left will be considered abandoned and disposed of." Bradley testified that he received both letters a few days after October 1.

October 10

On October 10, 2009, at about noon, Bradley telephoned then fellow employee William Graham[32] at work, and asked Graham to speak to Snure as to whether he was interested in

[30] From the testimony of all witnesses, it is clear that this offer of a cash payment to finish work on a transmission, was money in addition to the pay owed to Bradley by the Respondent, and not in lieu of said paycheck.

[31] It's not likely that Snure had possession of Bradley's check during the conversation as other testimony indicates that the checks likely had not even been printed or transported to the Respondent so early in the day.

[32] At the time, Graham was employed by the Respondent as a machinery operator, but was laid off on November 14, 2009. He testified pursuant to the General Counsel's subpoena.

purchasing Bradley's "Snap-On" toolbox. Pursuant to Bradley's request, Graham spoke to Snure. Graham testified that Snure told him he would buy Bradley's toolbox and tools, and Graham arranged for a meeting at work between Bradley and Snure for 2 p.m. on October 10. At about 2 p.m. Bradley met with Snure in an office at the Respondent's premises. Also present for the meeting was Snure's wife, Patricia, and Graham.

The meeting began with Snure and Bradley signing an "asset purchase agreement for the toolbox and tools," and then Snure presented Bradley with a check for $3500, the agreed-on price for the toolbox and tools. Graham also signed the purchase agreement as a "witness," and Patricia Snure signed as a notary.

All witnesses agree that after the toolbox purchase agreement was signed and Snure gave Bradley the check for the tools, the next part of the discussion involved the issue of Bradley's paychecks. According to Graham, Snure was holding two of Bradley's paychecks, and told Bradley that he couldn't have the checks unless he signed a waiver and completed an IRS W-9 form. Bradley replied that he wasn't going to sign the paperwork and that he would "get ahold of his lawyer from the Union." Graham further testified, "George Snure would still not give him his checks and then said that the union lawyer wasn't going to do nothing for him, that he needs to sign it." Graham testified that Bradley again refused the papers, but that Snure stopped Bradley from leaving the office, handed him the paychecks, and told Bradley to hold on to the checks because of taxes.

On cross-examination by the Respondent's counsel, Graham was asked whether Snure said anything to Bradley about lawyers in addition to his comment about the union lawyer not being able to do anything for him. The Respondent's counsel further asked Graham if Snure told Bradley that the union attorney was not a tax attorney, or whether there was any discussion "regarding the fact that Lee [Bradley] may want to get a tax attorney because there's this issue over who's an independent contractor, who's an employee." In answer to these questions, Graham, essentially, denied that Snure made the comment in respect to Bradley's "union attorney" in the context of recommending that Bradley retain a tax attorney. In this respect, Graham explicitly denied that Snure told Bradley that a union attorney is not a tax attorney or that Bradley should retain a tax attorney.

Bradley testified that after he received the check for the toolbox from Snure, he asked Snure about the "two paychecks that I still hadn't received yet from September 18." According to Bradley, "he [Snure] told me…he had my paychecks but he wanted me to sign paperwork again on a 1099 for being a subcontractor." Bradley testified that he refused to sign the 1099 paperwork, and Snure told him that he was going to keep the paychecks, whereupon Bradley replied, "You know, I have a Union lawyer, that she could take care of…that I could wait…you know…I didn't care…I'd wait." Bradley further testified, "As soon as I said union lawyer, he got mad about that and told me that the union lawyer was not doing anything for me and was not going to do nothing for me, that I should sign the subcontracting contract and that I could be working right now."

Eventually during the meeting, Bradley signed the waivers, but not the 1099 document, and received his paychecks from Snure. According to Bradley, just before Snure handed him the paychecks, he commented to Bradley that "he [Snure] should keep the checks for taxes that he had not been removing from my paychecks being I wasn't a full time employee."

Snure, on direct examination, was asked by the Respondent's counsel to testify as to "who said what," in respect to that portion of the Bradley/Snure conversation that involved Bradley's paychecks. Snure's testimony in response, verbatim, is as follows: "It was about four

minutes, let's see. Lee Bradley, here's the final waivers for the last two checks. Lee Bradley states I have no problem signing that, I just can't sign, no; I think it was W-9 independent contractor agreement and then W-2. And I said, you told me to get an attorney so I got me an attorney. I said is that the union attorney? And he said yes. I said there's a difference between a union attorney and tax attorney. I said that if an employee has a check I have to withhold taxes, so there could be tax ramifications on that you need to be aware of. I know all about that. And I left it at that."

Patricia Snure testified that during the October 10 meeting, her husband, Snure, asked Bradley if he had any problems signing waivers for the last two pay periods, that Bradley said no, that Snure gave Bradley some "tax paperwork," that Bradley was "adamant" that he wasn't going to sign a W-9 due to "his attorney" telling him not to, that Snure asked Bradley if "he had a union attorney," that Bradley answered, "Yes," and that Snure replied, "there's differences between attorneys and this is a tax issue, he should get a tax attorney."[33] According to Patricia Snure, during the meeting Bradley received two paychecks and a check for the toolbox, and signed two waivers for the paychecks.

Analysis and Conclusions

Complaint Paragraph V(a)

Complaint Paragraph V (a) alleges that the Respondent violated Section 8(a)(1) as follows: "On or about September 18, 2009, Respondent, by George Snure, interrogated employees about their Union activity and testimony at a National Labor Relations Board (NLRB) hearing." In her brief, counsel for the General Counsel argues that the Respondent violated Section 8(a)(1) when Snure, during his September 18 conversation with Bradley, "interrogated Bradley, asking why he had voted at the election and why he thought he had a right to testify at the Board proceeding." The Respondent's counsel, in his brief, comments as follows as to the September 18 conversation between Snure and Bradley, "Bradley additionally admits that Snure made no comment during the meeting…regarding employees testifying at the NLRB."[34]

I find, as set forth above, that during his September 18 conversation with Bradley, Snure expressly told Bradley that he [Snure] couldn't believe that Bradley had testified at the NLRB hearing on challenges, and that he didn't understand why Bradley had voted [during the NLRB election] and explicitly asked Bradley how he had the audacity to vote for the Union. The conversation occurred in the employee lounge at the Respondent's workplace, and Bradley had reported to the lounge for the conversation, at Snure's instructions.

In its decision in *Intermet Stevensville*, 350 NLRB 1349, 1353 (2007), the Board reaffirmed the following considerations in dealing with interrogation allegations: "In determining

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[33] I do not credit Patricia Snure's testimony to the effect that her husband was simply advising Bradley to consult a tax attorney. Graham, a witness who stands to personally gain nothing by this litigation and who testified with impressive demeanor including responding in a generally non-argumentative manner to the questions of all counsel, testified to the contrary. I, thus, credit Graham over Patricia Snure, who testified in support of her husband.

[34] Citing the following passage of Bradley's testimony: Q. "Now, on that September 18th meeting, did he [Snure] discuss about employees giving future testimony at the NLRB?" A. "There was no discussion about that, no." The cited testimony does not substantiate the assertion in the Respondent's brief to the effect that Bradley admitted that Snure "made no comment during the meeting…regarding employees testifying at the NLRB."

whether an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights." The factors to be considered in analyzing the interrogation include: "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of the interrogation." (citations omitted).

In applying the factors outlined by the Board, I conclude that Snure's questioning of Bradley on September 18 was coercive, and in violation of Section 8(a)(1) as alleged in the complaint. Thus, the questioning occurred in the context of a disputed NLRB election and in a time period during which the NLRB was conducting a hearing into a challenge of the ballot of Bradley, along with other voters. The questioning was undertaken by the Respondent's highest official, the owner, and the information sought involved the basis upon which Bradley decided to vote for the Union.

In addition, the usage of the word "audacity"[35] by Snure, in questioning Bradley's vote in favor of the Union, is suggestive that Bradley's action in voting in favor of the Union was fraught with peril and, thus, at least implies the possibility that Bradley could suffer some adverse consequences by having casted his vote in favor of the Union. All of these circumstances, the background, the identity of the questioner, the information sought, and the suggestion of possible adverse consequences by the usage of the word "audacity," lend a coercive nature to Snure's interrogation of Bradley and interfere with Bradley's exercise of Section 7 rights.

Complaint Paragraph V(b)

Complaint paragraph V(b) alleges that on the same date as the above-discussed interrogation, September 18, 2009, Snure "advised employees that they should not testify against Respondent at an NLRB hearing." The General Counsel apparently points to two portions of Bradley's testimony as establishing the merit of this allegation.

First, Bradley testified as to an asserted September 8 conversation with Snure, as follows: "It was said by George Snure, and it was just me and him there in the office lounge, whatever you want to call it, it all went back to he just couldn't believe that I was there testifying for the Union against him, why, you know, again, he thought I was a, I thought I was a full-time employee. It was all in relations to me testifying on that previous Friday, that he didn't think I should have been there, he wanted to know why I thought I had a right to be there." Second, Bradley testified that during the September 18 conversation with Snure, "he said he didn't feel I had the right to vote. I didn't have the right to testify:"

Inasmuch as I have not credited Bradley's testimony that a conversation occurred with Snure on September 8, I, likewise, find it to be of no support for complaint paragraph V (b). Further, even if I had credited Bradley's above-cited testimony as to a September 8 conversation with Snure, I could not conclude that said testimony established that, in fact, Snure said that he didn't think that Bradley should have testified, simply because it's not clear from his testimony that Bradley was testifying as to something Snure said, rather than as to Bradley's own presumption as to what Snure was thinking.

As to Bradley's testimony as to what Snure said to him on September 18, I found that, in fact, Snure told Bradley that he didn't have the right to testify. I conclude that this is tantamount

[35] Definition from dictionary.com: "Boldness or daring, especially with confident or arrogant disregard for personal safety, conventional thought, or other restrictions."

to "advising employees that they should not testify against the Respondent at an NLRB hearing." Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraph V(b).

Complaint Paragraph V(c)

Complaint paragraph V(c) alleges that on or about October 10, 2009, the Respondent, by Snure, "stated to employees that it was futile to support the Union," thereby violating Section 8(a)(1). In this regard, counsel for the General Counsel argues that the "Respondent violated Section 8(a)(1) on October 10 when Snure told Bradley that the Union attorney could not do anything for him." The Respondent argues that whatever comment Snure made about the Union's attorney simply "focused on the differences in areas of legal practice," rather than on the attorney's status as the Union's attorney.

I found that during their October 10, 2009 conversation, Snure told Bradley that the "Union lawyer" wasn't going to do anything for him. As noted, the Respondent argues that Snure's words were uttered in the context of simply informing Bradley that he should retain a tax attorney to handle the issue of whether he should sign the Respondent's waivers or W-9 documents, rather than his lawyer from the Union. I find the Respondent's argument here unpersuasive simply because I have credited the testimony of Graham and Bradley as to that aspect of the conversation, rather than the testimony of Snure and his wife to the effect that Snure explicitly made the suggestion that Bradley retain a tax attorney, rather than a union attorney. Thus, I do not find that Snure simply suggested to Bradley a tax attorney specialist as a possible alternative to the Union's lawyer, but instead explicitly told Bradley that the Union's lawyer or union lawyer wasn't going to do anything for him.

The Board has held that comments designed to suggest to employees that choosing representation by a union is a futile act is coercive of Section 7 rights and a violation of Section 8(a)(1), particularly when combined with suggestions that the union's representative is incompetent or ineffectual. See, for example, *National Health Care, L.P.*, 327 NLRB 1175 fn. 2 (1999). Here, Snure's comment to Bradley, that the Union's lawyer was not going to do anything for him, conveys both messages, that enlisting the Union's assistance is futile, and that the Union's lawyer is not capable of helping Bradley. Accordingly, I conclude that by Snure's action in telling Bradley that the Union's lawyer wasn't going to do anything for him, the Respondent informed employees that it was futile to support the Union, in violation of Section 8(a)(1), as alleged in complaint paragraph V(c).

Complaint Paragraph VI(a)

Paragraph VI(a) of the complaint alleges that on or about September 18, the Respondent refused to pay Bradley for hours previously worked, and thereby violated Section 8(a)(3) of the Act. I found that on September 18, Snure instructed Bradley to sign paperwork including a lien waiver form and other documents if he wanted to receive his paycheck. Snure told Bradley that absent Bradley signing the documents, Snure would not give him his paycheck, and Bradley would have to see the Respondent's lawyer about his pay.

According to Bradley, "At the end of the questionnaire and the end of the second set of questionnaires which were on a notebook pad, he held up my check with the waiver stapled to it. He told me if I wanted my check that I was going to sign this paperwork." While I also found that Snure did not have possession of Bradley's paycheck when he made the comment, and that Bradley was not due to actually receive his paycheck until later in the day, Snure's

comments clearly implied that absent signing the Respondent's documents, the Respondent had no intention of paying Bradley, and he would not receive his paycheck.

Inasmuch as the complaint alleges that the Respondent's refusal to pay Bradley on September 18[36] violated Section 8(a)(3) and (4), I analyze the allegation pursuant to the Board's *Wright Line*[37] criteria.[38] Here, I have found that Bradley testified at an NLRB proceeding[39] adversely to the interests of the Respondent, and that the Respondent's owner, Snure, was aware of such. Further, I found that Snure had expressed hostility to Bradley's actions by telling him that he didn't think he had a right to testify at the NLRB proceeding, had interrogated Bradley as to how he had the "audacity" to vote for the Union, and had implied to Bradley that choosing union representation was futile. I, thus, conclude that the General Counsel has demonstrated the Respondent's animus to Bradley's protected activities. The General Counsel having, thus, demonstrated a prima facie case,[40] under *Wright Line* the burden of persuasion shifts to the Respondent to demonstrate that it would have taken the same actions vis-à-vis Bradley absent protected activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

Here, the Respondent argues that it withheld Bradley's check because Bradley refused to sign certain documents proffered by the Respondent dealing with Bradley's employment status. But the record demonstrates that such documents, and a concomitant threat not to pay, only became of moment immediately after Bradley testified at the NLRB hearing and voted in the NLRB election. Prior to Bradley's participation in protected activity, there is no evidence that the Respondent refused to pay Bradley in a similar fashion. Accordingly, I conclude that the Respondent has failed to demonstrate that it would have acted against Bradley absent his protected activity, and that, as is alleged in the complaint, the Respondent violated Sections 8(a)(3) and (4) of the Act by its refusal to pay Bradley on September 18.

Complaint Paragraphs VI(b), (c), (d), and (e)

The General Counsel alleges in these complaint paragraphs that the Respondent constructively discharged Bradley in violation of Section 8(a)(3) and (4) as follows: that Bradley resigned his employment with the Respondent on September 18, 2009; that the Respondent caused Bradley's demise specifically by its actions alleged in complaint paragraph VI(a), the Respondent's failure to pay Bradley on September 18, and complaint paragraphs V (a), (b), and (c) i.e., the alleged interrogation of September 18, the alleged advice not to testify against the Respondent of September 18, and the expression of union futility of October 10; and that the constructive discharge was in violation of Sections 8(a)(3) and (4) of the Act and, thus, in retaliation for Bradley's union activities and his action in testifying against the Respondent at an

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[36] The undisputed evidence demonstrates that Bradley received this paycheck on October 10, 2009.

[37] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[38] *Wright Line* analysis also utilized in 8(a)(4) cases. See, for example, *SPE Utility Contractors, LLC,* 353 NLRB No. 123 (2009).

[39] Section 8(a)(4) of the Act extends protection to witnesses at NLRB proceedings. See, for example, *Lamar Advertising of Hartford*, 343 NLRB 261 (2004).

[40] Having demonstrated that Bradley engaged in protected activity and testified at an NLRB hearing, that the Respondent had knowledge of such and displayed animus thereto, signifying a nexus to Bradley's activities, the General Counsel has successfully presented a prima facie case.

NLRB hearing.

The General Counsel, thus, explicitly alleges in the complaint that the Respondent caused Bradley to resign on September 18 by refusing to pay him on September 18, by engaging in interrogation and advising against NLRB testimony on September 18, and by warning of futility on October 10, all of which actions are alleged, themselves, as violations of the Act. I have found that the Respondent, in fact, and as alleged, violated Section 8(a)(3) by failing to pay Bradley on September 18, and Section 8(a)(1) by interrogating, and by advising employees not to testify on September 18, and by telling employees that union representation was futile on October 10.

However, counsel for the General Counsel, in her brief, does not limit herself to the factual underpinnings of constructive discharge explicitly alleged in the complaint, as set forth above. Instead, she argues that the Respondent violated the Act "by *repeatedly* refusing to pay Bradley for hours he had worked thereby constructively discharging him," even though the complaint only alleges a single instance of such (emphasis supplied). In addition, counsel for the General Counsel relies on other violations of the Act assertedly committed by the Respondent, but which are not alleged in the complaint as violations. These nonalleged assertions set forth in counsel for the General Counsel's brief include: "Respondent violated Section 8(a)(1) of the Act by interrogating Bradley on August 10"; "Repeatedly interrogating him [Bradley] on September 8"; "retaliated against Bradley by requiring him to sign waivers of liens"; and "requiring him [Bradley] to sign a questionnaire aimed at relinquishing his employee status." Counsel for the General Counsel argues that all are violations of the Act, but the complaint does not allege any to be.

Thus, while counsel for the General Counsel argues that the Respondent violated the Act in these various respects and that such played a causative role in Bradley's resignation, the General Counsel alleges none of these actions in the complaint either as violations of the Act or as causing Bradley's resignation, Inasmuch as counsel for the General Counsel has not moved to amend the complaint to add these assertions as alleged violations, nor even presented an argument as to why I should nonetheless make such findings, I decline to either find that the Respondent violated the Act as set forth in counsel for the General Counsel's brief, but not in the complaint, or that such actions led Bradley to quit. See further discussion of the issue, infra.

Counsel for the Union, in her brief, also travels far beyond the allegations in the complaint to both argue that the Respondent committed violations of the Act beyond those alleged in the complaint, and that those additional violations caused Bradley's constructive discharge. Thus, the Union, in its counsels' brief, asserts that the Respondent violated the Act by imposing a lien waiver requirement on Bradley,[41] as follows: "…the Judge should find that the Company violated Sections 8(a)(3) and (4) of the Act when the Company imposed a lien waiver requirement upon Bradley because of his protected activity." There is no complaint allegation as to imposition of a lien waiver requirement on Bradley, no allegation that the Act was so violated, and no allegation that such was a cause of Bradley's resignation. Further, no motion has been submitted to so amend the complaint or argument made that I should find such violation in the absence of a complaint allegation.

The Union further argues in its counsels' brief, that the Respondent constructively discharged Bradley by delaying his paychecks on "August 7 and 21, 2009, until he executed a lien waiver, then by refusing to allow his girlfriend to pick up his check while he was at the

[41] And that such action was a cause of Bradley's decision to quit.

hearing on September 4, 2009," in addition to the alleged actions of September 18, 2009. The Union cites correctly cases including *Addicts Rehabilitation Center Fund, Inc*., 330 NLRB 733 (2000), for the proposition that "the indefinite withholding of an employee's paycheck is the kind of grievous burden imposed by an employer which would support a finding of constructive discharge."

Yet, the complaint alleges none of the Respondent's asserted actions of August 7 and 21, and September 4, as violations of the Act. Clearly, as argued by the Union, an employer's withholding or delay in paying its employees in retaliation for union activities would violate the Act. Yet the complaint here does not allege, among other assertions argued by counsel for the General Counsel and counsel for the Union, that the Respondent delayed Bradley's paychecks on August 7 and 21 until he executed a lien waiver, or that the Respondent refused to allow his girlfriend to pick up his check on September 4, or that any of these asserted actions played a role in Bradley's alleged constructive discharge. Inasmuch as the complaint does not allege as violations the Respondent's asserted retaliatory imposition of a lien waiver requirement on Bradley and the Respondent's asserted retaliatory refusal to allow Bradley's girlfriend to pick up his check, I will not rule on the merits of such unalleged theories of violation here.[42]

Alleged Constructive Discharge of Bradley

In *Seville Flexpack Corp.*, 288 NLRB 518, the Board explained the basis of the theory of constructive discharge as follows: "The Board has held that constructive discharge occurs when an employee quits because an employer has deliberately made working conditions unbearable. Two elements must be proved to establish a constructive discharge: First the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that these burdens were imposed because of the employee's union activities." (citations omitted). The test is an objective one, taking into account the circumstances of each case.

[42] While it's true that the General Counsel asked witnesses questions which elicited answers impacting on these belated assertions of illegal activity, the Respondent had insufficient notice that the case was being tried on these theories, which likely impacted on decisions as to what evidence to introduce and what questions to ask witnesses. See, *Waldon, Inc.,* 282 NLRB 583 (1986). Further, because the complaint explicitly detailed the basis of the constructive discharge theory, which included none of the belated assertions of illegal activity, to allow the General Counsel now to pursue its theory of constructive discharge so as to include these asserted, but unalleged additional violations of the Act, would be to, in my judgment, deny the Respondent due process. While counsel for the General Counsel alluded to some of these belated assertions of illegal activity in her brief opening statement, such did not, in my judgment, rise to the level of putting the Respondent on notice. The Board discussed the issue as follows: "In *N.L.R.B. v. Quality C.A.T.V., Inc.,* 824 F.2d 542, 547 (7th Cir. 1987), the court examined whether due-process concerns precluded the Board from finding a violation regarding an unalleged unfair labor practice. The court, in reviewing whether a party had fair notice of the allegations against it, stated, inter alia, that; 'But the simple presentation of evidence important to an alternative claim does not satisfy a requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [the respondent's] due process rights.'" *United Mine Workers of America, District 29,* 308 NLRB 1155, 1158 (1992). I note that the Seventh Circuit remanded *NLRB v. Quality C.A.T.V*., supra, to the Board, where it was accepted as the law of the case, and that the Seventh Circuit's opinion was later favorably cited by the Board in *United Mine Workers*, id.

Algreco Sportswear Co., 271 NLRB 499, 500 (1984).

As noted, the complaint here alleges that the Respondent caused the constructive discharge of Bradley on September 18 by refusing to pay Bradley, by interrogating Bradley on September 18, by advising Bradley on September 18 not to testify at an NLRB hearing, and by telling Bradley on October 10 that union representation was futile. The Respondent's expression of union futility, which I have found to be in violation of Section 8(a)(1), occurred on October 10, about 3 weeks after the alleged constructive discharge and, thus, could not have been a factor and, contrary to the complaint, I find that it was not. Further, telling Bradley that he should not testify or interrogating him, both found to be in violation of the Act, do not by themselves, or together, meet the standard of "so intolerable as to force a resignation." *Allegro Sportswear Co*., supra.

However, as argued by the Union in its brief, the indefinite withholding of an employee's paycheck meets the Board's criteria for working conditions so difficult as to force an employee to resign. *Addicts Rehabilitation Center Fund, Inc*., supra. Here, I found that on September 18, Snure told Bradley that that unless he signed all the paperwork that Snure was proffering,[43] the only way that Bradley would receive his paycheck would be to see the Respondent's lawyer. By imposing such hurdles on Bradley, to simply receive what he was due, and even placing his pay in doubt, the Respondent placed Bradley in the untenable position, if he continued to work for the Respondent, of having to perform work without assurance of being paid for it, or at the least, that receiving his rightful pay for work already performed wouldn't be easy.[44] Under these circumstances, I conclude that the Respondent constructively discharged Bradley as is alleged in the complaint. As I already have concluded, utilizing a *Wright Line* analysis, that the Respondent's actions vis-à-vis Bradley's pay violated Sections 8(a)(3) and (4), so does his constructive discharge.

I have also considered the procedural defense raised in the brief of the Respondent's counsel. Here, the Respondent appears to argue that the constructive discharge allegation should be dismissed because of inconsistency between the amended charge filed on November 18, 2009, and the Regional Director's consolidated complaint dated December 17, 2009, and additionally, because the first charge filed by the Union alleged a discharge, while the amended charge changed the theory of violation to a constructive discharge.

As to the asserted inconsistency between the complaint and the amended charge, the Respondent argues, essentially, that the complaint alleges that the constructive discharge was, in part, due to the Respondent's failure to pay Bradley wages owed, but that the amended charge, while alleging the constructive discharge of Bradley, doesn't mention the Respondent's alleged failure to pay Bradley. The Respondent further urges dismissal, arguing that the 8(a)(1) allegations in the complaint, such as interrogation or "futility," are not contained in the charge or amended charge. Finally, the Respondent argues that the fact that the original charge did not

[43] As found, the paperwork included the lien waiver and notes of Snure's questioning of Bradley.

[44] Being told to see the Respondent's lawyer for paychecks, would be reasonably understood by most people to mean that obtaining one's pay wouldn't be easy and might involve the courts. Further, while it's true that Snure offered Bradley cash to stay on September 18 and finish work on a particular transmission, he also, at the same time, told Bradley that as to his paycheck, he would have to see the Respondent's attorney. Thus, Bradley knew then that if he stayed and finished work on the transmission he would receive pay for that particular piece of work, but also understood that receiving his paycheck was in doubt.

allege a constructive discharge demonstrates that the constructive discharge allegation is without factual merit.

I find that these arguments of the Respondent are unpersuasive because "it is well settled that it is the complaint, not the charge that is supposed to give notice to the respondent of the specific claims made against it." *Redd-I, Inc.*, 290 NLRB 1115 fn. 12 (1988).[45] Here the complaint contained the constructive discharge allegation, the basis for said allegation, and the 8(a)(1) allegations that I have considered in this decision. The Respondent raises no Section 10(b) issues.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to pay Garland Lee Bradley on September 18, 2009, and by causing his termination on September 18, 2009, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.
4. By refusing to pay Garland Lee Bradley on September 18, 2009, and by causing his termination on September 18, 2009, the Respondent has been discriminating against employees for giving testimony under the Act in violation of Sections 8(a)(1) and (4) of the Act.
5. By the following actions on the dates set forth below, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act:
   (a) On September 18, 2009, interrogating employees about their union activity and testimony at a hearing of the National Labor Relations Board.
   (b) On September 18, 2009, advising employees that they should not testify against the Respondent at a hearing of the National Labor Relations Board.
   (c) On October 10, 2009, telling employees that choosing union representation was futile.
6. The unfair labor practices set out above in paragraphs 3, 4, and 5, affect commerce within the meaning of Section 2(6) and (7) of the Act.
7. The Respondent, in no manner other than that specifically found herein, including any manner alleged in the complaint or otherwise, has violated the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(1), (3), and (4) of the Act, it will be ordered to cease and desist therefrom and from any like or related conduct. Having found that the Respondent caused the

[45] "The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing. The "charge" has a lesser function. It is not designed to give notice to the person complained of or to limit the hearing or to restrict the scope of the final order. It serves in the function of drawing the Board's attention to a cause for economic disturbance." *Douds v. Longshoremen*, 241 F.2d 278, 283–284 (2d Cir. 1957). Cited in *Redd-I, Inc.*, supra.

termination of Garland Lee Bradley in violation of Sections 8(a)(3) and (4) of the Act, it will be ordered to offer him immediate and full reinstatement to his former position of employment or, if that position is no longer available, to a substantially equivalent one without prejudice to his seniority or any other rights or privileges he may have previously enjoyed and make him whole for any loss of earnings and benefits he may have suffered by reason of the Respondent's discrimination against him. Backpay will be computed in accordance with the Board's decision in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[46] Further, the Respondent will be ordered to remove from its files any references to the unlawful termination and notify Bradley that it has done so and will not use the discharge against him in any way. The Respondent will also be ordered to post a remedial notice.

On these findings and conclusions of law, and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Graham's Trucking and Excavating, Inc., Cedar Lake, Indiana, its officers, agents, and successors, and assigns, shall

1. Cease and desist from:

(a) Interrogating employees concerning their union activities or testimony at an NLRB hearing.

(b) Advising employees that they should not testify against the Respondent at an NLRB hearing.

(c) Telling employees that choosing to be represented by a union is futile.

(d) Refusing to pay employees because they participated in union activities.

(e) Refusing to pay employees because they testified at an NLRB hearing.

(f) In any like or related manner restraining, coercing, or interfering with employees in the exercise of their Section 7 rights, in violation of section 8(a)(1) of the Act.

(g) In any like or related manner discriminating against employees in order to discourage support for or membership in a labor organization, in violation of Section 8(a)(3) of the Act.

(h) In any like or related manner discriminating against employees for giving testimony to the NLRB, in violation of Section 8(a)(4) of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer full reinstatement to Garland Lee Bradley to his former job, or if that job no longer exists, offer him a substantially equivalent position, without prejudice to his seniority and other rights or privileges previously enjoyed.

(b) Make whole Garland Lee Bradley for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay is to be computed as set forth in the remedy section of this decision.

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[46] I decline to order interest compounded on a quarterly basis as part of the remedy, as sought by the General Counsel. In several recent cases, the Board has declined to change its current method of calculating interest, and I am bound by Board precedent. See, for example, *Transportation Solutions, Inc.*, 355 NLRB No. 22, fn. 6 (2010).

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days of this Order, remove from its files any reference to the constructive discharge of Garland Lee Bradley.

(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Regional Director, all payroll records, Social Security payment records, timecards, personnel records, and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(e) Within 14 days of service by the Region, post at its Hebron, Indiana, and Cedar Lake, Indiana, facilities copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. August 10, 2010

_____
Mark D. Rubin
Administrative Law Judge

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representation to bargain on your behalf.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these activities.

WE WILL NOT coercively advise you not to testify against us at a hearing of the NLRB.

WE WILL NOT tell you or imply that choosing a union to represent you is futile.

WE WILL NOT coercively question you as to your activities on behalf of or sympathies in respect to a union, or in respect to your testimony at a hearing of the NLRB.

WE WILL NOT discharge you or cause you to quit because of your activities on behalf of a union or because you testified at a hearing of the NLRB.

WE WILL NOT refuse to pay you or instruct you that you must see our attorney to be paid because of your support for a union or because you testified at a hearing of the NLRB.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain you in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL NOT in any like or related manner discriminate in regard to your hire or tenure or terms and conditions of employment, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

WE WILL NOT in any like or related manner discriminate in regard to your hire or tenure or terms and conditions of employment because you testified at a hearing of the NLRB.

WE WILL, within 14 days from the date of the order, offer full reinstatement to Garland Lee Bradley to his former position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Garland Lee Bradley for any loss of earnings and benefits suffered as a result of our discrimination against him, with interest.

WE WILL, within 14 days from the date of this order, remove any references to the constructive discharge or quitting of Garland Lee Bradley, and advise him that such has been done and will not be used against him in the future.

GRAHAM'S TRUCKING & EXCAVATING, INC
(Employer)

Dated: _____ By: _____
(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak, confidentially to any agent with the Board's regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

209 S. LaSalle Street, 9th floor
Chicago, Illinois 60604
Telephone: (312) 353-7570
Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISION MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.